Luker v. Sykes

Introduction:

The Alaska Supreme Court issued an opinion in the case *Luker v. Sykes*[79] in 2015. The case discussed whether Sykes has a right to access his property across his neighbor's lots. The ruling considered both the application of an express easement and a section line easement based on RS-2477[80] across the Luker property. This paper only addresses the section line easement. The purpose of this paper is to discuss the level of research that may be necessary to determine the status of an RS-2477 based section line easement.

An RS-2477 section line easement can only be applied over "…federal public lands, not reserved for public uses…" A valid homestead entry has been found to segregate lands from the public domain, thereby preventing imposition of a subsequent RS-2477 section line easement. The question in this case is whether the effective date of the section line easement, generally the approval date of the federal township survey, preceded the homestead entry or whether the prior existing homestead entry prevented application of the section line easement.

The property in question is located to the northeast of Fairbanks at approximately milepost 21 and to the south of Chena Hot Springs Road. The homestead claim is primarily located within the northeast one-quarter of Section 32, Township 1 North, Range 4 East, Fairbanks Meridian. Portions of the homestead extend to the north and east into Sections 28, 29 and 33.

Sykes argued that he was entitled to use the north 33-feet of Tax Lots 3318 and 3353[81] based on an express easement or an RS-2477 section line easement. The section line easement in question is located along the northerly line of Section 33 and the northerly line of the Elbridge Walker homestead (See Figure 1).

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[79] *Luker v. Sykes*, 357 P.3d 1191, WL 6087341, Alaska, October 16, 2015.

[80] The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976. For a more detailed discussion of RS-2477 and section line easements, see *Highway Rights-of-Way in Alaska 2013,* John F. Bennett, PLS, SR/WA published on the Alaska Society of Professional Land Surveyors website at https://www.alaskapls.org/wp-content/standards2013/Highways-2013.pdf

[81] TL 3318 is crossed by the west half and TL 3353 is crossed by the east half of the "Subject SLE" as shown on Figure 1.

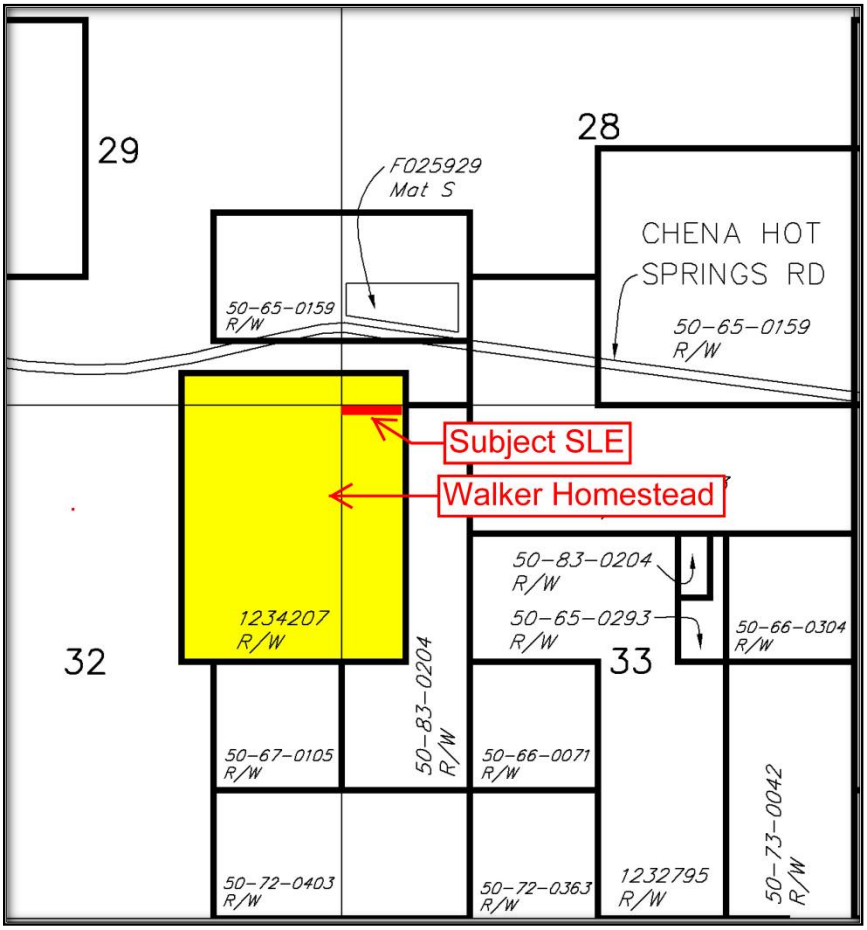

Figure 1 - Walker Homestead Location

Case Background:

George Luker first contacted Northern Region DOT&PF Right of Way office regarding a conflict over blocked access to his property in January of 2002[82]. Given the ambiguities of right-of-way research, members of the public would often request assistance from DOT&PF on these issues. At this time, it was determined that the road in question was not under DOT&PF jurisdiction and he was referred to DNR for evaluation of an RS-2477 trail easement. Subsequently it was apparent that the access conflict between neighbors also included the subject SLE. In February, the superior court heard the case *Tubbs v. Luker*[83]. "The focus of that case was a temporary restraining order and a preliminary injunction, sought by the Tubbs, to force the Lukers to remove barriers and signs blocking access to the Tubbs' property."[84] The witnesses for Luker included a professional land surveyor who testified that no section line

[82] Email exchange between George W. Luker II and John F. Bennett, DOT&PF Northern Region Right of Way Chief, January 4, 2002.

[83] *Tubbs v. Luker*, Case 4FA-02-259CI, Feburary 22, 2002.

[84] *Sykes v. Luker*, *Memorandum Decision*, Case 4FA-06-2646CI, March 8, 2012

easement existed because the entry date for the initial homestead was prior to the federal survey. The court issued the preliminary injunction along with the statement: "The Defendants [the Lukers] have provided evidence to support a conclusion that no section-line easement exists and the court so finds."[85] A final decision was never issued, as the Tubbs did not pursue their lawsuit to conclusion. The case was dismissed in August of 2002.

In October of 2004, Jilu Luker recorded a 22-page document[86] that consisted of a collection of letters, BLM abstracts, historical index, plats and testimony from the previously referenced *Tubbs v. Luker* case. It appears that the purpose of this filing was to place on record the Luker's continuing assertion that no section line easements existed within the bounds of the Walker homestead.

The following November, Sykes recorded a 34-page *Affidavit of Cossette L. Kimmel*.[87] Kimmel testified that she had resided on various homesteads and locations along Chena Hot Springs Road since 1957 and was knowledgeable of activities in the area. She and her husband sold their property at 20.5 mile Chena Hot Springs Road to George and Jilu Luker in 1999[88]. Kimmel and her husband acquired their interest in this property at a land auction from the Frontier International Land Corporation[89], whose President and Chairman of the Board of Directors was Dr. Dwane J. Sykes. Kimmel's affidavit attests that the Luker's were made aware of the existing SLE as follows:

> f. Furthermore, at the time of that 1999 sale my husband and I personally told Mr. and Mrs. Luker that both our auction parcels Ref. 7-4 and 7-3, purchased by them, were subject to roadway easements over the north 33 feet adjoining the section line…
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> g. We further personally stressed to Mr. and Mrs. Luker that they could not close, block, lock or restrict travel over our long-existing entry road from Grange Hall Road within the north 33-foot right-of-way over our two 2.5 acre parcels sold to them, nor over the un-constructed 33-foot right-of-ways adjoining the section lines of our TL 3318 and their own TL 3208…
>
> 36. Shortly after the Walkers entered their homestead at 20 mile CHSR, Mrs. Walker became gravely ill. Leaving no one on his homestead, Mr. Walker took

[85] Ibid.
[86] Document 2004-024186-0 recorded on 10/25/2004, Fairbanks Recording District.
[87] Document 2001-026914-0 recorded on 11/29/2004, Fairbanks Recording District.
[88] Warranty Deed Kimmel to Luker, Book 1155 Page 11, recorded on 8/6/1999, FRD.
[89] Warranty Deed Frontier International Land Corp. to Donald C. and Cossette L. Kimmel, recorded in Book 93, Page 532 on November 25, 1977, FRD.

> his wife and young children outside to the lower 48 states for some years, where Mrs. Walker eventually died.
>
> 37. When Mr. Walker later returned, he discovered his house had been totally ransacked, even the walls and coverings striped out, and it was unusable and unlivable. In heart-broken discouragement and despair, he left and again abandoned his homestead for some time…

In November of 2011, Sykes made contact with the Right of Way section requesting that DOT&PF issue a letter attesting to the validity of section line easements over the Walker homestead patent.[90] Sykes provided data taken from the BLM online abstract system (ACRES) suggesting that there had been three separate entries (See Figure 2) by Walker prior to patent being issued. Syke's FAX stated the following:

> I was fortunate to locate a 1953-70 CHSR homesteader, personally familiar with this Walker homesteader, able to testify to the exact reasons and circumstances for Mr. Walker's three above-said entries, interruptions and re-entries. The Undisputed Facts and relevant portions of 11/19/2004 Recorded Affidavit of Cossette Kimmel enclosed with its copies of certified copies of the relevant BLM records, etc.
>
> Mr. Walker's own beliefs can be deducted from the BLM Case Abstract, i.e. Mr. Walker, himself, must have believed in his own mind, that his first entry became official abandoned, vacated and invalid. Otherwise, he would not have officially filed the second new entry. Same thing in his own mind for the second entry becoming invalid neccssitating [*sic*] the third and final entry.
>
> I purchased this homestead from original homesteader Walker, recorded Apr. 13, 1973[91], and partitioned it in 1974, sold parcels and still own several parcels. There are no vacations.

In response[92], DOT&PF advised Sykes that as his SLE question did not relate to a facility under their jurisdiction, no formal position would be taken on its validity. DOT did comment on a printout of the BLM Historical Index (HI) that was provided with Syke's FAX. They noted that many of the HI transactions included a "REL", "CANC" or "EXP" comment to identify those that had been relinquished, cancelled or expired. However, the comment associated with Walker's initial homestead application dated October 27, 1958 said, "SEE PAT 1234207 11/19/1963"

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[90] FAX from Dr. Dwane J. Sykes to John F. Bennett, DOT&PF Northern Region Right of Way Chief, November 29, 2011.

[91] Judicial Foreclosure Deed to Patricia Sykes, Book 273, Page 360, Recorded April 13, 1973, FRD.

[92] FAX from John F. Bennett, Right of Way Chief, DOT&PF to Dwane Sykes, December 1, 2011.

instead of providing any indication that the entry had been relinquished, cancelled or expired. The DOT&PF response to Sykes questioned whether BLM considered Walker's initial entry to have been relinquished or closed or if BLM allowed Walker's earlier claim to be continued. DOT further recommended that Sykes perform additional research with BLM or obtain a legal opinion.

CUSTOMER DATA

Cust ID:	000046772
Customer Name:	WALKER ELBRIDGE B
Customer Address:	Withheld

ADMINISTRATIVE/STATUS A

Date	Code Description:	Remarks
27-OCT-1958	001 Application Filed	--
10-JUL-1961	244 Final Proof Filed	--
10-JUL-1961	001 Application Filed	--
17-JUL-1961	244 Final Proof Filed	--
29-AUG-1961	244 Final Proof Filed	--
28-AUG-1963	176 Authorization Issued	ENTRY ALLOWED
19-NOV-1963	879 Patent Issued	--
19-NOV-1963	970 Case Closed	TITLE TRSF
27-AUG-1992	996 Converted To Prime	--

Figure 2 – BLM "ACRES" On-Line Abstract

A complaint regarding the disputed section line easement was filed in superior court on October 17, 2006.[93] Both parties represented themselves. Over the next 6 years leading to *Final Judgment*, the record indicates that 11 superior court judges were involved in some trial event with seven either recusing themselves, being pre-emptively disqualified by the plaintiff or defendant or administratively re-assigned. *CourtView*[94] indicates that 38 motions were filed by the parties most of which were filed by Sykes. While these statistics may seem excessive for a case with relatively low public impact, the opening paragraph in the *Memorandum Decision* appears to offer some insight:

> This is a relatively simple case involving right-of-way and easement disputes which despite its simplicity – has spanned decades and consumed an inordinate amount of resources. The court lays responsibility for the delays and costs of finally bringing the case to trial squarely on the prolixity and dilatory tactics of Dwane Sykes.

[93] *Sykes v. Luker*, Case 4FA-06-2646CI, Final Judgment issued on March 8, 2012.
[94] Alaska Courts Public Access Website https://records.courts.alaska.gov/eaccess/home.page.3

The court also noted that with Sykes requesting over a half million dollars in compensatory damages and punitive damages that could result in an award in excess of one million dollars, that "Anyone would be hard pressed to characterize this case as primarily about access. The court finds it is primarily about money." The *Memorandum Decision* is also fairly blunt in questioning the veracity of both party's testimony, their defiance of court orders and their delaying tactics.

As in the 2002 *Tubbs v. Luker* case, the 2006 *Sykes v. Luker* case also had the benefit of testimony from a professional land surveyor regarding section line easement evaluation. However, in this case, the surveyor testified on behalf of Sykes for the proposition that a section line easement did in fact exist. The basis of the court's finding appears to be based again on the BLM on-line abstract for the Walker homestead.

> Walker made three entry claims for the property: 27 October 1958, 10 July 1961, and finally in 28 August 1963. The first two entries were not successful; the last entry, after the filing of the U.S. Survey, ultimately resulted in the issuance of a patent to the Walkers. The court finds the critical entry for purposes of determining whether a section line easement applies is the last entry that resulted in the issuance of a patent. Here, that successful entry was after the U.S. survey and therefore is subject to the section line right-of-ways.

Regarding the easement issues, the court found Sykes' testimony and evidence more credible than that of the Lukers. With regard to the claim for damages, the court found that the Lukers' testimony was more credible and persuasive. As the court determined that the major issue in the litigation was damages, the Lukers were found to be the prevailing parties. On that basis, the rules of the court would have awarded the Lukers attorney's fees. However, as neither party were represented by counsel, both assumed their own costs.

Supreme Court:

Jilu Luker and Dwane Sykes both appealed the superior court's decision to the Alaska Supreme Court in May of 2012. Once again, both parties represented themselves.

The court references several cases that provide the basis for RS-2477 trail and section line easements in Alaska. They note that the critical element in this case is the date by which the public lands transitioned from unreserved status, required for imposition of an RS-2477 right-of-way, to reserved status.

> The parties agree that the property at issue was "reserved for private uses" once Elbridge Walker acquired the right to homestead on it. The Lukers contend this occurred in 1958, upon Walker's first application for patent. Sykes contends it

> did not occur until 1963, when the BLM, as the federal agency charged with administering the homestead laws, allowed Walker's entry.

The Supreme Court noted that the lower court was correct in concluding that the critical entry date for determination of the existence of a section line easement is the entry that resulted in the issuance of a patent. However, the decision goes on to say that, the superior court erred in its conclusion that the 1963 BLM "Notice of Allowance" was the critical event that established a valid entry for Walker.

> Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized. " '[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim' in the appropriate land office. In Walker's case, that "inceptive right" was acquired when he filed his application for entry. Completing the application requirements and "fil[ing] his application in the United States Land Office" was "all that [an applicant] could possibly do to …[make] a lawful homestead entry".[95] At that point, the lands at issue became "subject to individual rights of a settler…[T]he portion covered by the entry [was then segregated from the public domain…and until such time as the entry may be cancelled by the government or relinquished, the land [was] not included in grants made by Congress under [RS 2477]."[96]

The court then disposes of Sykes' assertion that Walker's multiple "failed" entries are a result of his abandonment of his homestead. The court states that while such evidence might have been relevant in challenging Walker's homestead entry prior to patent, it was insufficient to show that his patent from BLM was defective.[97]

The Alaska Supreme Court reversed the superior court's finding that the Luker's property is burdened by an RS-2477 section line easement for the following reason:

> When section lines were later created in April 1962 upon the federal authorities' acceptance of the survey, Walker had already established his claim to the land, which had therefore ceased to be "public land, not reserved for public uses."

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[95] *Luker v. Sykes* citing *Hillstrand v. State*, 395 P.2d 74, 76 (Alaska, 1964) (quoting *Chotard v. Pope*, 25 U.S. 586, 588 (1827) & *United States v. 348.62 Acres of Land in Anchorage Recording Dist.* 10 Alaska 351, 364 (D. Alaska 1943) see also Hastings & D.R. Co. v. Whitney, 132 U.S. 357, 363 (1889).

[96] *Luker v. Sykes* citing *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961)

[97] See *State, Dept. of Transp. & Public Facilities v. First Nat. Bank of Anchorage*, 689 P.2d 483, Alaska 1984 - "Once the patent is issued, any defects in the preliminary steps required by the homestead laws are cured. When Pippel received his patent, his 1946 entry became presumptively valid." "The government should not be permitted retroactively to invalidate the deliberate actions of its officers after they have been reasonably relied on for 34 years."

The court found that Walker's homestead was not subject to the section line easements because both of his "application filed" dates preceded the survey approval date. The court states that Walker's application for homestead entry and final proof, both filed on July 10, 1961 met the requirements of the homestead laws and "At that point, the land became 'subject to individual rights of a settler…'"

We believe the court reached the correct conclusion but for the wrong reason. Once Walker's patent was issued on November 19, 1963, the doctrine of "relation back" vested his rights and segregated these lands from the public domain on the date of his initial application. Walker first filed his Notice of Location on October 27, 1958, nearly 3 ½ years prior to the approval of the township survey plat. At the time of plat approval, the lands were reserved by Walker's entry and not subject to imposition of a section line easement.

The court also suggests that the applicant could obtain patent subject to a later survey upon filing of the homestead entry application and final proof and that in some cases the patent could be issued without any survey at all. We believe that this is a misinterpretation of 48 U.S.C. § 371 (1958) by the court as we have yet to see a case where a patent has been issued for a homestead claim without benefit of a survey to define the location, size and shape of the patented lands. The statute cited by the court provides a mechanism to deal with situations where the public surveys have yet to be extended to the homestead area. Rather than have the homesteader who has met all the requirements to obtain a patent wait until the public land survey system has been extended, a provision under 48 U.S.C. § 359 can be triggered. This provision would allow a special survey (U.S. Survey) to be obtained at the expense of the claimant.

If the second "application filed" date noted in the abstract and used by the Court was dated after the township survey approval date, would the court have ruled that the homestead was in fact subject to the section line easement? That conclusion would have been in error but without going beyond the abstract and reviewing the case file documents, one might never know.

Walker Homestead Case File:

The Walker homestead case file was requested from the National Archives and was scanned and delivered electronically. The PDF file consisted of 80 pages.

The file indicates that the "Application Filed", date stamped by BLM on October 27, 1958 was in fact a *Notice of Location of Settlement or Occupancy Claim in Alaska*[98]. Walker

[98] BLM Form No. 4-1154 (July 1957)

claimed occupancy as of October 22, 1958 and qualified his homestead description as "…what will be when surveyed." At this stage of initial settlement, he could not file a *Homestead Entry Application* until the township survey had been completed. On March 24, 1959, BLM issued a letter to Walker accepting his claim for "recordation" in the BLM records. This action assigned a serial number to the claim, and advised Walker that there were no conflicts of record. In addition, the letter stated that his Location Notice was approved as of the date of its filing and that he may now "proceed to perfect his claim in accordance with the applicable regulations."

A note submitted by Walker on February 21, 1959 states, "as of Jan 31 we moved onto our homestead and took up residents (sic)." On October 3, 1960, after the section corner monuments had been established but prior to approval of the township survey plat, Walker filed an *Application for Amendment of Claim*[99]. Walker recognized that the pre-survey location of his homestead was in error resulting in his house falling outside of his claim boundaries.

On July 10, 1961, Walker filed his *Homestead Entry Application*[100] and his *Homestead Entry Final Proof*[101]. The BLM on-line abstract notes two additional "Final Proof Filed" entries on July 17, 1961 and August 29, 1961. These are the two witness affidavits[102] required to verify the residency, cultivation and improvements made by the entryman. On August 28, 1963, after BLM had performed an examination of the homestead, an "Entry Allowed" decision was issued for the Walker homestead. While the township survey was approved on April 16, 1962, the decision notes, "On September 21, 1962, the plat of survey embracing the lands in the claim was officially filed in this office. The regulations contained in 43 CFR 101.6(c) require that upon the filing of the official plat of survey, the claim must be adjusted to conform to the public survey." The *Certificate*[103] approving issuance of the homestead patent was dated November 14, 1963. Patent No. 1234207 was issued on November 19, 1963.

Although the Homestead regulations provided for a "Leave of Absence"[104] for a year or less due to sickness, there is no evidence in the Walker file that one was ever requested or that there was ever any indication of intent to abandon his homestead entry. None of this was evident because the parties to the case and the courts appear to have never reviewed the homestead case file.

[99] BLM Form No. 4-005 (July 1958)
[100] BLM Form No. 4-007 (November 1958)
[101] BLM Form No. 4-369 (July 1958)
[102] BLM Form No. 4-369a (April 1958)
[103] BLM Form No. 4-1195 (August 1961)
[104] 43 CFR § 65.16 Leave of absence. Title 43 Revised as of January 1, 1963

Conclusion:

The case law discussed in this paper establishes the rules by which a homestead entryman can obtain a vested right against the government. Prior to patent, the homesteader's rights cannot be vested by occupation and settlement alone and they cannot be vested by solely filing an application for entry and then failing to comply with the settlement requirements. Once patent is issued, the homesteader's rights vest by "relation back" to that date when they have made the first valid entry that led issuance of the patent. Prior activities such as settlement, occupation, possession and posting may protect a homesteader's rights as against other claimants, but a valid homestead entry *by application* must be made before the homesteader's rights are protected against the imposition of a federal action and the land is segregated from the public domain. To establish a valid entry, the homesteader must file a *Notice of Location of Settlement or Occupation* or a *Homestead Entry Application* at the Land Office.

In Walker's case, when he commenced his settlement in 1958, he could only file a *Notice of Location of Settlement or Occupation* because the land had not yet been surveyed. When the survey plat was filed with the land office on September 21, 1962, Walker had up to 3 months[105] after that date to file his *Homestead Entry Application.* However, Walker had filed his application for homestead entry more than a year prior to the plat filing because once the monuments had been set, he then knew the true relationship between his claim and the section lines. Once he had met all his homestead requirements under the Doctrine of "Relation Back"[106], his rights vested back to the date of his October 27, 1958 Notice of Location which would be considered as the date the lands were segregated from the public domain. While this doctrine may not protect the homestead entryman's interest against every type of federal action or withdrawal[107], the Public Land Orders establishing highway rights-of-way in Alaska were subject to "valid existing rights" and the RS-2477 based section line easements could only apply to "unreserved" public lands.

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[105] 43 CFR § 166.15 Initiation of settlement claims. Title 43 Revised as of January 1, 1963.

[106] Relation back is a legal doctrine that considers an act performed at one time to have taken place at an earlier time. See *Knapp v. Alexander-Edgar Lumber Company,* U.S. Supreme Court, April 5, 1915. "The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut off intervening claimants."

[107] See *Albert A. Howe*, IBLA 76-676, September 15, 1976. "However, I would not conclude that this doctrine may be invoked to prevent a withdrawal by the United States from attaching to land subject only to a homestead application if there is a clear expression in the language of the withdrawal that such an inchoate right is not excepted from the effect of the withdrawal."

Why had the issue of multiple homestead applications as noted in the BLM abstract for *Luker v. Sykes* not been addressed in Alaska's prior key cases relating to rights-of-way? A review of *Hamerly v. Denton* (1961 RS-2477 Trail), *Girves v. Kenai Peninsula Borough* (1975 RS-2477 SLE), *Resource Investments v. State* (1984 PLO) and *DOT&PF v. First National Bank of Anchorage* (1984 PLO) indicates that all of these cases related to homestead entries on surveyed lands. Where the lands were already surveyed, the entryman was only required to file a single application for homestead entry as the notice of location of settlement was most commonly used to initiate a claim on un-surveyed lands.

The key lesson learned in this case was that without a review of the original homestead file, there is a risk that facts necessary for an accurate evaluation of a section line easement will be overlooked.